

**QUARTERLY ATTORNEY REPORT  
ENTERPRISE  
April 2004**

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**TO:** CRWCD ENTERPRISE BOARD OF DIRECTORS

**FROM:** PETER C. FLEMING, GENERAL COUNSEL  
JILL MCCONAUGHY, ASSOCIATE COUNSEL  
KIRSTIN MCMILLAN, STAFF COUNSEL

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Dear Directors:

This report identifies matters for potential discussion at the April 21, 2004, meeting of the River District's Enterprise. A separate Confidential Report (Attachment A to the General Report) addresses confidential matters. The information in this report is current as of April 8, 2004, and will be supplemented as necessary before or at the Board meeting.

**I. EXECUTIVE SESSION**

The following is a list of matters that qualify for discussion in executive session pursuant to C.R.S. §§ 24-6-402(4)(b) and (e):

- A. Update on Elkhead Reservoir Enlargement Negotiations.
- B. Woford Mountain Reservoir 2<sup>nd</sup> Enlargement Application, Case No. 03CW302, Water Division 5.
- C. Woford Mountain Reservoir Hydro-Electric Project.
- D. Eagle Park Reservoir Co. Supplemental Homestake Reservoir Exchange with Aurora.

**II. CONSENT AGENDA**

*We propose that the Board approve the following items on a consent agenda.* Of course, the Board may choose to remove any item from the consent agenda.

- A. **Ratification of Motion to Intervene and Statement of Opposition in Case No. 01CW371, Application of 4 Eagle Ranch, Water Division 5.** This amended application proposes to use the River District's Eagle River Supply based on a future contract. We previously entered into a stipulation with the applicant, instead of filing a statement of opposition. The stipulation requires any decree to condition the future construction of the applicant's ponds on the applicant obtaining a sufficient augmentation supply from the River District (or some other source) and absolves the River District of any obligation to notify the applicant if additional Eagle River Supply becomes available for contract. The water referee subsequently notified the parties that the water court would not enforce the stipulation unless the River District officially became a party to the case (the stipulation would still be enforceable as a contract between the parties). Therefore, we filed a motion to intervene and a statement of opposition, which the Court accepted. We will enter an identical or similar stipulation with the applicant in the official water court proceeding. *We recommend that the Board ratify the filing of the motion to intervene and statement of opposition by approval of the consent agenda.*
- B. **Ratification of Statement of Opposition, Case No. 03CW295, Application of Patrick and Patricia McConathy, Water Division 5.** We filed a statement of opposition at the end of February in Case No. 03CW295, an application of Patrick and Patricia McConathy, that proposes to use the District's water supplies based on a future contract. *We recommend that the Board ratify the filing of the statement of opposition by approval of the consent agenda.* We will work with the applicants on a water supply contract and appropriate language to be contained in any proposed decree.
- C. **Ratification of Statement of Opposition, Case No. 03CW314, Application of City of Colorado Springs, Water Division 5.** We filed a statement of opposition at the end of February in Case No. 03CW314, an application of the City of Colorado Springs, that proposes to use the District's water supplies in an exchange plan based on a future contract. We also have concerns with some of the applicant's claimed exchanges. *We recommend that the Board ratify the statement of opposition by approval of the consent agenda.* We will work with the applicant on a water supply contract and appropriate language to be contained in any proposed decree.
- D. **Ratification of Statement of Opposition, Case No. 03CW327, Application of Jeff and Carla Donelson, Water Division 5.** We filed a statement of opposition at the end of February in Case No. 03CW327, an application of Jeff and Carla Donelson, that proposes to use the District's water supplies based on a future contract. *We recommend that the Board ratify the filing of the statement of opposition by approval of the consent agenda.* We will work with the applicants on a water supply contract and appropriate language to be contained in any proposed decree.

- E. Ratification of Statements of Opposition, Cases No. 03CW333, 03CW334, 03CW335, and 03CW336, Applications of Shorefox, LLC, Water Division 5.** We filed four statements of opposition in February and March in Cases No. 03CW333, 03CW334, 03CW335, and 03CW336, which are applications of Shorefox, LLC, that propose to use the District's water supplies based on a future contract. *We recommend that the Board ratify the filing of the statements of opposition by approval of the consent agenda.* We will work with the applicant on a water supply contract and appropriate language to be contained in any proposed decrees.

### **III. WATER PROJECTS**

**A. Elkhead Reservoir Enlargement.**

There has been substantial progress in recent weeks on the Elkhead Reservoir Enlargement negotiations. Dan Birch's memo to the Board of April 8, 2004, explains the Board action sought at this time. In addition, separate confidential memos from David Hallford and Lee Leavenworth provide detailed summaries of the negotiations and recommendations. The confidential memos from Mr. Hallford and Mr. Leavenworth are included in your Board material as Attachments B and C, respectively to this memo. *The Board may wish to discuss these issues in executive session.*

**B. River District Application for Wolford Mountain Reservoir 2<sup>nd</sup> Enlargement, Case No. 03CW302, Water Division 5.**

Pursuant to the Board's direction, we filed an application at the end of December for a conditional storage water right in the amount of 9,775 acre feet for the Wolford Mountain Reservoir 2<sup>nd</sup> Enlargement. The period for filing statements of opposition expired at the end of February. A total of five statements of opposition were filed by the City and County of Denver, City of Colorado Springs Utilities, Grand Valley Water Users Association, Ute Water Conservancy District, and Orchard Mesa Irrigation District. We received the Division Engineer's Summary of Consultation at the end of March, and it raises concerns about the claim of a right to refill when in priority and the claim of a right to reuse and make successive use of the water right. We will hold an initial status conference in the near future and start working to resolve the concerns of the objectors and the Division Engineer.

We have been working with River District technical staff on the planning for the enlargement and the hydro-electric project at Wolford Mountain Reservoir. As explained in Jim Pearce's memo of April 9, 2004 (included with your Board material), we have received an additional preliminary feasibility report from our consulting engineer which shows that the project appears feasible from an engineering perspective. Jim's memo recommends the River District pursue additional engineering work in order to continue pursuing the project. Jim's memo also discusses the permitting considerations that result from moving forward with the enlargement contemporaneously with the hydro-electric project.

*The Board may wish to discuss certain issues related to the enlargement in executive session.*

**C. Wolford Mountain Reservoir Hydro-Electric Project.**

We continue to study how the Wolford Hydro-Electric Project and the proposed Wolford Second Enlargement may interact. As reported previously, it does not appear that the enlargement would present a technical complication for the hydro-electric plant (or vis versa), but it is possible that the enlargement could complicate the permitting process for the hydro-electric plant if the two projects are pursued simultaneously. We believe there is a logical reason that the permitting should not become more complicated because, at least preliminarily, each project can be economically and technically justified on an independent basis. In other words, the enlargement is not necessary for the hydro plant, and the hydro plant is not necessary for the enlargement. A confidential memo from special counsel Mike McCarty that contains a preliminary discussion of the Federal Energy Regulatory Commission ("FERC") permitting issues is included with your Board material as Attachment D to this memo.

*These issues are discussed further in the Confidential Report and the Board may wish to discuss the issues further in executive session.*

**D. Eagle Park Reservoir Co., Supplemental Homestake Reservoir Exchange with Aurora.**

At the April 2, 2004, Special Joint Meeting, the Board conceptually approved the River District's participation in a supplemental exchange involving the Eagle Park Reservoir Company and Aurora. The exchange will provide the reservoir company (of which the River District is a shareholder) with up to 500 acre feet of additional water to be released by Aurora from Homestake Reservoir or other suitable sources for use on the West Slope. The supplemental water will be available to the reservoir company only when the company has a positive credit balance of exchanges into Homestake Reservoir. In return, the reservoir company will exchange additional water into Homestake Reservoir to increase the physical supply for Aurora when the reservoir would otherwise be out-of-priority.

Colorado Springs, Aurora's partner in the Homestake Project, is not participating in the supplemental exchange which has complicated the negotiations and the drafting of the agreement to some extent. *We hope to have a revised version of the proposed agreement to recommend for approval at the Board meeting.*

In addition, we also need to discuss in more detail with the Board an internal agreement with the reservoir company to pledge certain River District water resources to the operation of the exchange. *The Board may wish to discuss these issues further in executive session.*

**E. River District's Application to Make Absolute the Wolford Mountain Reservoir First Enlargement, Case No. 03CW192, Water Division 5.**

There are no objectors to our application to make the Wolford Mountain Reservoir First Enlargement water right absolute and, in the alternative, for a finding of reasonable diligence. The Division Engineer's summary of consultation recommends that the application for an absolute water right be granted. We submitted a proposed ruling and decree to the water referee on February 17, 2004 and are waiting for it to be approved.

**F. River District/City of Colorado Springs Application for CSU Substitution Plan, Case No. 03CW320, Water Division 5, and Consolidated Cases No. 2782, 5016 & 5017, U.S. District Court.**

We filed a joint application with Colorado Springs Utilities ("CSU") at the end of December to adjudicate CSU's substitution plan, that will allow it to divert out-of-priority as against Green Mountain Reservoir and substitute releases from other West Slope sources, including an account the River District will maintain for CSU at Wolford Mountain Reservoir. The application is a required component of the May 25, 2003, Memorandum of Agreement Regarding Colorado Springs Substitution Operations among the River District Enterprise, Colorado Springs, Denver, Northern Colorado Water Conservancy District, Summit County, Vail Summit Resorts, and the Town of Breckenridge. The period for filing statements of opposition expired at the end of February. A total of thirteen statements of opposition were filed by Breckenridge, Vail Associates, Vail Summit Resorts, Denver, Aurora, Everist Materials, Grand Valley Water Users Association, Ute Water Conservancy District, Orchard Mesa Irrigation District, Northern Colorado Water Conservancy District, Northern's Municipal Subdistrict, Summit County, Colorado Water Conservation Board, and the U.S. Bureau of Reclamation. We will keep the Board informed of the progress of this case.

#### **IV. OTHER MATTERS**

**A. Revisions to Water Marketing Policy and Water Supply Contract Form.**

*We propose that the Board approve our draft revisions to the Water Marketing Policy and Water Supply Contract as shown in the redlined versions of the documents included in your Board material at Attachments E and F to this memo, respectively.*

Some of the changes have been discussed and approved by the Board at prior meetings and, although we have operated the water marketing policy in accordance with the changes, we now are making the actual changes to the policy. Most of the changes are new and are proposed to address or clarify issues that have been raised in the ongoing implementation of the water marketing program.

The changes to the Water Marketing Policy are intended to (1) update the list of Wolford Mountain Reservoir water rights, (2) require Board approval of water supply contracts to serve any parcel of land that was previously served with water rights conveyed out of Water Division No. 5, (3) remove the provisions for retail service because the River District has never offered retail service contracts and does not have any current plans to do so, (4) notify contractors to identify all of the River District's water sources in their plans for augmentation and/or exchange or temporary substitute supply plans that rely on River District water supply contracts, (5) increase the River District's flexibility to provide water from alternate sources (6) allow a municipality to accumulate more than 20 acre feet of Eagle River Supply if it requires as a condition of annexation the conveyance of an existing water supply contract to serve the annexed parcel, (7) clarify the River District's policy regarding assignments and attach a sample assignment form, and (8) clarify that agricultural contracts are shorted up to 100% before M&I contracts are shorted.

The changes to the Water Supply Contract are intended to (1) limit the River District's delivery obligation to the operational capacity of the project facilities (*e.g.*, the River District cannot measure reservoir releases in very small flow rates), (2) preserve the River District's ability to deliver its water supply from alternate sources regardless of whether those sources are specifically identified in contractors' augmentation, exchange, and/or substitute supply plans, (3) require contractors to identify all of the River District's water sources in their augmentation, exchange, and/or substitute supply plans, (4) make the contractor responsible for any transit losses imposed by the Division Engineer, (5) clarify that a transfer fee must be paid to the River District for any assignment of a water supply contract, and (6) require contractors to consult with the Army Corps of Engineers to ensure compliance with section 404 of the Clean Water Act as the result of the construction of any facilities necessary to use the contracted water (this provision is required by our Ruedi Repayment Contracts).

Attachments:

- A. Confidential Report from P. Fleming, January 8, 2004 (attached to General Report)
- B. Confidential Memorandum from D. Hallford, Balcomb & Green, P.C., dated April 8, 2004
- C. Confidential Memorandum from L. Leavenworth, Leavenworth & Karp, P.C., dated April 7, 2004
- D. Confidential Memorandum from M. McCarty, Brickfield Burchette Ritts & Stone, dated December 26, 2003
- E. Water Marketing Policy, draft dated April 21, 2004
- F. Water Marketing Contract, draft dated April 21, 2004